**Vallery Electric, Inc. and J. Vallery Electric, Inc., as a single employer/alter ego *and* International Brotherhood of Electrical Workers, Local Union No. 446, AFL–CIO.** Cases 15–CA–14575 and 15–CA–15304

December 14, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On February 7, 2000, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondents filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Vallery Electric, Inc. and J. Vallery Electric, Inc., as a single employer/alter ego, Monroe and West Monroe, Louisiana, their officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) Withdrawing its recognition of the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit described below."

2. Substitute the following for paragraph 2(a).

"(a) Immediately recognize the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All employees performing electrical work."

3. Substitute the following for paragraph 2(d).

"(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order."

*Andrea Goetze, Esq.,* for the General Counsel.
*Edwin K. Theus, Esq.,* for the Respondent Vallery Electric, Inc.
*Price Barker, Esq.,* for Respondent J. Vallery Electric. Inc.
*John Hopkins,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on October 6 and 7, 1999, pursuant to a complaint filed by the Regional Director for Region 15 of the National Labor Relations Board (the Board) on June 30, 1999. The complaint as amended at the hearing is based on charges filed by International Brotherhood of Electrical Workers Local Union 446, AFL–CIO (the Union or the Charging Party) and alleges that Respondents, Vallery Electric, Inc., (VE) and J. Vallery Electric, Inc. (JVE) are a single employer and/or that JVE is an alter ego of VE and that Respondents violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). The answers as amended at the hearing filed by VE and JVE each deny the commission of any violations of the Act. In addition, in its posthearing brief the Respondent JVE asserted an affirmative defense that the charges underlying the complaint were untimely filed under Section 10(b) of the Act.

On the entire record in this proceeding including the briefs filed by the parties, I make the following

FINDINGS OF FACT[1]

I. JURISDICTION

*A. The Business of Respondents*

The Respondents are electrical contractors performing electrical work in the Monroe and West Monroe area in Louisiana and are employers within the meaning of Section 2(2), (6), and (7) of the Act as members of an employer bargaining unit as hereinafter discussed.

*B. The Appropriate Unit*

The appropriate unit is all employees of Respondents performing electrical work.

*C. The Labor Organization*

The complaint alleges, Respondents admit, and I find that at all times material, the Union has been, and is a labor organization within the meaning of Section 2(5) of the Act.

[1] The judge found that the Respondents, as an alter ego or single employer, entered into a 9(a) relationship with the Union. The Respondents' exceptions do not dispute the judge's 9(a) finding. Therefore, the Respondents have not preserved this issue for appeal. See Sec. 102.46(b)(2) of the Board's Rules and Regulations. See also *Parsippany Hotel Management Co. v. NLRB*, 99 F.3d 413 (D.C. Cir. 1996), enfg. 319 NLRB 114 (1995) (respondent waived right to raise 10(b) issue because issue was not raised in exceptions to judge's decision before the Board). Accordingly, we affirm the judge's 9(a) finding. Contrary to the Respondents' exceptions, we also agree with the judge that the appropriate bargaining unit is "all employees performing electrical work," as described in art. II, sec. 3, par. 8 of the parties' September 1, 1997, to August 31, 1999 collective-bargaining agreement.

[2] We shall modify the judge's recommended Order to correct the inadvertent omission of the unit description and to conform to our recent decision in *Ferguson Electric Co*., 335 NLRB 142 (2001).

[1] The facts in this case are largely undisputed and the following includes a composite of the credited testimony and the exhibits received in evidence.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

VE was incorporated by Jimmy Vallery and A. J. Vallery in 1993. A. J. Vallery is Jimmy's father. The Company is an electrical contracting business. A. J. Vallery was a vice president of the corporation and Jimmy Vallery was the president of the corporation. Jimmy Vallery's wife, Bobbi Futch Vallery, served as the secretary/treasurer of the corporation and also performed office and clerical duties. The board of directors was comprised of Jimmy, Bobbi, and A. J. who will be referred to by their first names for purposes of clarity.

On September 1, 1992, Jimmy signed a "Letter of Assent" on behalf of VE with Lonnie Shows, business manager, on behalf of the Union. Under the terms of this agreement, VE authorized Quachita Valley Chapter Inc. NECA (National Electrical Contractors Association) as its collective-bargaining representative for all matters in the current and any subsequent approved Inside Agreement. Subsequently the Union referred employees to VE to perform commercial electrical work and VE paid these employees the union scale and contributed to the union benefit funds on behalf of these employees. At the same time VE continued to hire and fire electricians on an open-shop basis to do residential work and did not pay the union scale to these employees. Nor did it pay into any union benefit funds on their behalf.

On October 4, 1995, newly elected Union Business Manager John Hopkins sent a letter to Jimmy and VE informing them that on September 1, 1995, the Union had negotiated new agreements with Quachita Valley Chapter (the Association) from September 1, 1995, through August 31, 1997. The letter also stated:

> Any verbal or written agreements made by the prior administration with the Quachita Valley Chapter or any individual contractors will not be honored by this administration. Only signed agreements by this administration will be honored.
>
> The newly elected officers and I are looking forward to working with each and every contractor and wish to move forward in recovering the electrical market in Local 446 jurisdiction.

On June 18, 1996, a Recognition Agreement was signed by Jimmy on behalf of VE and Hopkins on behalf of the Union wherein VE recognized the Union as the exclusive collective-bargaining agent for all employees within the contractually described bargaining unit.

On November 18, 1997, the Union and the Association entered into an "Inside Agreement" on behalf of the employers for the period from September 1, 1997, to August 31, 1999, to continue thereafter from year-to-year unless changed or terminated as set out in the agreement. Article 2, section 3 of the Inside Agreement states that the "Employer recognizes the Union as the exclusive representative of all its employees performing electrical work within the jurisdiction of the Union for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment. Any and all such employees shall receive at least the minimum wages and work under the conditions of the Agreement."

On November 18, 1997, the Union and the Association entered into a Line Contractor's Agreement for the period from September 1, 1997, until August 31, 1999, unless otherwise specifically provided for and to continue in effect from year-to-year thereafter unless changed or terminated as set out therein. The Agreement sets out that it applies to all firms who sign a Letter of Assent to be bound by the Agreement. The Agreement contains a hiring hall provision for IBEW Journeymen Linemen and Journeymen Technicians.

On November 18, 1997, the Union and the Association signed a commercial Market Recovery Agreement to be effective from September 1, 1997, to August 31, 1999, and to continue in effect from year-to-year thereafter unless changed or terminated as set out therein. The agreement applies to all commercial and institutional work not normally considered to be residential or industrial work.

The complaint alleges that the employees of Respondents in the unit described above in article II, section 3 of the collective-bargaining agreement effective from September 1, 1997, to August 31, 1999, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. The complaint alleges that Respondent VE entered into a recognition agreement dated June 18, 1996, wherein it recognized the Union as the exclusive collective-bargaining representative of the unit on the basis of the Union's establishing its majority status among the unit and that the Union has at all times since that date been the exclusive collective-bargaining representative of the unit under Section 9(a) of the Act.

The complaint further alleges that since about March 21, 1997, Respondents have failed to continue in full force and effect the terms and conditions of the Agreement by failing to apply them to the union employees employed by Respondent JVE which the Union did not know prior to October17, 1997. The complaint further alleges that the aforesaid terms and conditions of employment of the unit employees employed by Respondent JVE are mandatory subjects for the purposes of collective bargaining. The complaint further alleges that on or about April 9, 1999, Respondent JVE withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit. The complaint alleges that the foregoing conduct was violative of Section 8(a)(1) and (5) of the Act.

The evidence adduced at the hearing as testified to by A. J., Jimmy and former Union Business Manager Lonnie Shows established that the parties did not enforce the Agreement with respect to electricians performing residential work when VE recognized the Union as the collective-bargaining representative of the unit employees performing electrical work. The agreement was enforced only as to electricians performing commercial work who were referred to VE by the Union. The employees who performed residential work were not referred to VE by the Union. VE hired and fired them as a nonunion shop operation, set their wages, hours, and other terms and conditions of employment, all without exception taken by the Union. This situation continued until early 1996, when new business manager, John Hopkins, came into the picture and began to urge that VE follow the labor agreement on behalf of the resi-

dential electricians as well as the commercial electricians referred to VE by the Union.

Jimmy became an apprentice electrician and a journeyman in 1975 as a member of Local 446 of the IBEW. He formed VE to do electrical work in the Monroe and West Monroe, Louisiana area. In 1977, he was joined by his father, A. J. Vallery, who had then recently retired from his position of superintendent of the electrical department of the city of Monroe. Father and son formed a partnership and in 1993, they incorporated their business as VE. Jimmy and his wife, Bobbie, owned shares of stock. There had been a business downturn in the early 1980s. However, by 1990 economic conditions had improved in the Monroe area. Lonnie Shows who served as business agent of the Union for 18 years from 1977 to 1995 approached Jimmy, who he had known for many years and had traveled with for several years in the past in seeking electrical work. He suggested that VE recognize the Union and begin doing commercial and industrial work using union electricians to be referred from the Union's hiring hall. VE did so and signed the Letter of Assent in 1992.

Thereafter VE received referrals from the union hall for electricians to perform industrial and commercial work and paid these electricians the union scale and paid into the union benefits funds on their behalf. Simultaneously, VE hired and fired electricians to perform residential work and paid them on an open-shop basis without regard to the union contract. Jimmy testified this was his understanding as to what he had agreed to and was corroborated at the hearing by former business manager, Lonnie Shows, who testified that electricians performing residential work had never been represented by the Union and that some contractors sponsored the residential electricians through the Union's apprenticeship program as a source of electricians to become industrial and commercial electricians. This situation prevailed for several years until Shows resigned as business manager and John Hopkins became his successor as business manager in 1995. Hopkins was not content to continue this practice but determined to enforce the Recognition and Labor Agreements with respect to all of VE's electricians whether they performed industrial, commercial, or residential electrical work. This situation continued with Hopkins asserting the Union's right to represent all of the electricians employed by VE. He wrote to VE, talked on the telephone and met personally with Jimmy and filed a grievance with the Association concerning the use of nonunion residential electricians to perform work on a commercial job rather than electricians referred by the Union to do industrial and commercial work.

As a result of the pressure being asserted by Hopkins and his concern that Hopkins would seek to have the recognition and the labor agreements enforced with respect to the residential electricians employed by VE, Jimmy decided to form a separate corporation ostensibly to perform only residential work to avoid the recognition agreement and other labor agreements from being enforced by the Union with respect to the electricians performing residential electrical work. At one point, Hopkins had spoken to the Association's president, Glen Pickett, on VE's behalf in furtherance of Jimmy's request that there be a separate wage scale for residential electricians. However, Pickett informed Hopkins that the other union contractors were not interested in negotiating a separate agreement for the residential electricians.

In March 1997, Jimmy resigned his position with VE and the stock ownership of Jimmy and Bobbi was transferred to A. J. Jimmy formed a new corporation, J. Vallery Electric (JVE) and the ownership of stock in this new corporate entity was vested in Jimmy and Bobbi. As part of this change the trucks and motor vehicles and various tools were divided between the two corporations. Bobbi testified that $13,000 in the VE checking account was retained in that account by A. J. Vallery who took over the operation of VE. Jimmy Vallery became president of newly formed corporation JVE and Bobbi Vallery became secretary/treasurer of JVE and their son, Todd Vallery, became a vice president and Jimmy, Bobbi, and Todd became members of the board of directors of JVE. VE moved to a new location. JVE stayed in the former location of VE where it currently operates out of and is engaged primarily in residential work, but occasionally does commercial work on request. VE remains primarily involved in commercial work although A. J. testified he generally does not actively seek new work and has only made a few bids on new work. He is awaiting word on the startup of a commercial job at a hospital on which he was the low bidder. At the time of the hearing VE had completed their most recent job and there were no electricians employed by VE. VE is no longer listed in the yellow pages of the telephone book and JVE has an almost identical advertisement in the telephone book for commercial and residential work as VE formerly had.

Thus in May 1996, Jimmy Vallery formed JVE which has since performed both residential and commercial work employing all but the two employees of VE who had been referred by the Union and operating in the same building with many of the same vehicles originally owned by VE. JVE has ignored the union labor agreement and has withdrawn recognition from the Union.

Contentions of the Parties

The General Counsel contends in her brief as follows:

As an admitted member of a multiemployer bargaining group, Respondent VE is properly subject to the Board's jurisdiction because the requisite facts demonstrating interstate commerce were met by Associate Member Copeland Electric by stipulation of the parties citing *Burfco Corp.,* 291 NLRB 1015, 1019 (1988), and *Hillsamer Painting Contractors,* 272 NLRB 1366 (1954), holding jurisdiction appropriate over member of employer group when another member met statutory standards. Therefore, the Board has jurisdiction over the Respondents because members of multiemployer bargaining groups are considered a single employer citing *Insulation Contractors of Southern California*, 110 NLRB 638 (1955), and *Laundry Owners Assn. of Greater Cincinnati*, 123 NLRB 543 (1959).

Noting that generally, the elements necessary to prove alter ego and/or single-employer status are much the same, the General Counsel chooses to focus on the alter ego analysis, citing *Carpenters Local 1846 v. Pratt-Fansworth*, 690 F.2d 489 (5th Cir. 1982). The key elements in establishing an alter ego are

"substantial identity of management, business property, operation, equipment, customers, supervision and ownership." *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 553–554 (3d Cir. 1983). It is also significant in determining alter ego status whether the purpose in creating the new entity was to evade collective-bargaining obligations, citing *Fugazy Continental Corp.*, 265 NLRB 1301, 1301–1302 (1982).

The intertwining of the two entities in this case is substantial. After JVE was established, with the exception of the two employees retained by VE, "business as usual" continued at JVE. JVE does the same work as VE did prior to the formation of JVE. Jimmy supervised the labor relations at VE (including the signing of the agreements with the Union) and does so at JVE. Bobbi does all the secretarial work for JVE as she did at VE. JVE uses the same equipment, premises, operating structure, and accounting services as did VE. JVE transferred the majority of the electricians and helpers employed by VE to JVE's payroll at startup. JVE is essentially a disguised continuance of VE, and an attempt to evade feared imposition of statutory bargaining duties and wages, citing *Industrial Turnaround Corp. v. NLRB*, 115 F.3d 248 (4th Cir. 1977), holding that common equipment, address, work force, business, and completion of jobs by one entity after started by another support alter ego finding.

The facts in this case hearken to a case where a union employer forms a new nonunion company to avoid financial hardship, citing *I & F Corp.*, 322 NLRB 1037 (1997). However, in this case there was no existing financial exigency, which promoted the formation of JVE but the fear of the future if VE was under an obligation to pay union wages to all of its employees. Jimmy told Association President Glen Pickett that he was going to start JVE because he could not afford to pay union wages on the residential work performed by VE. Jimmy also admitted at the hearing that he did not think paying union wages was economically feasible for his residential work and that prompted him to form JVE. The General Counsel argues further that if he did not think VE might have to pay union scale, logically, he would not have formed JVE for there would have been no need. Jimmy's desire to avoid the implications of unionization and concurrent statutory responsibilities when he incorporated JVE support the finding of an alter ego relationship between VE and JVE, citing *Bufco Corp.*, supra, wherein an alter ego relationship was found when the father transferred stock of contracting business to son, repudiated union contract with his electrical contracting business, and transferred electrical contracting employees to payroll of general contracting business now owned by son, father engaged in this course of conduct "to unload some problems," supplemented by *Bufco Corp.*, 323 NLRB 609 (1997). Union avoidance can be a decisive factor in determining the existence of an alter ego, citing *Mastin Bush Iron & Metal*, 329 NLRB 124 (1999).

There is also a telling lack of an "arms' length" relationship. Only family members are involved in the ownership and control of both VE and JVE. No moneys ever changed hands in any of the transactions including the sale or transfer of assets such as vehicles, real property or company stock. The foregoing connections are legally significant and suggest alter ego status. *Precision Builders*, 296 NLRB 105 (1989); see *NLRB v. Deena Artware Inc.*, 361 U.S. 398, 403–404 (1960).

The General Counsel also rejects Respondent JVE's argument that VE's contractual obligation consisted only of commercial work, and that VE continued to honor its obligations, thus excluding JVE from liability. JVE argues that VE and the Union voluntarily agreed to change the scope of an established bargaining unit, as parties are permitted to do and that the creation of JVE was immaterial, because JVE employees performed only residential work, and were therefore not covered by VE's agreement with the Union, citing *A-1 Fire Protection, Inc.*, 250 NLRB 217 (1980), supplemented by 273 NLRB 964 (1984), discussing agreement and waiver as means to change composition of the bargaining unit. The General Counsel contends that this argument ignores the absence of any meaningful distinctions between VE and JVE regarding commercial and residential work. The Spare Room Music Warehouse which involved commercial work was one of the first jobs undertaken by JVE and thus undermines Respondent's argument that VE was bound only to honor the contract regarding employees assigned to perform commercial work. As an alter ego of VE, JVE was bound to honor its bargaining obligations with the Union from almost the day of its inception, because JVE performed commercial work from the first.

Alternately, the General Counsel argues that any possibility of a change in the composition of the bargaining unit to exclude employees engaged in residential work evaporated when Hopkins became the Union's business manager. VE executed a Letter of Assent, which obligated it to abide by the Inside Agreement. The Inside Agreement in effect from 1995–1997 was signed by Hopkins and contained description of work covered, which included all electrical work in the Union's jurisdiction. VE affirmed its bargaining obligation for all of its employees when Jimmy executed the Recognition Agreement in 1996, after Hopkins entered office. Jimmy knew that Hopkins believed the Union had the right to represent all of VE's employees, and that he did not intend to honor the past business agent's comfy "wink and a nod" side agreements with the contractors. Thus, there is no way Jimmy would rely on a continuation of any agreements regarding the extent of coverage of his employees and he did not, which is why he formed JVE.

The material evidence in the record regarding the scope of unit coverage consists of the written documents, and the testimony of the negotiating parties. The testimony of Pickett who administered and negotiated the agreements on behalf of the Association and Hopkins who negotiated and enforced the agreement for the Union is controlling regarding the unit and the work covered. Association President Pickett testified that member contractors did residential work with employees subject to union contracts. Hopkins testified he believed all of VE's employees to be covered, and that he was attempting to bring them under the protection of the Union through means palatable to Jimmy such as investigating whether the Association would adopt an agreement regarding residential work. Hopkins' attempts to forge a new agreement in this regard were unsuccessful and Jimmy formed JVE in response.

The General Counsel concludes that JVE was formed in an attempt to evade VE's longstanding relationship with the Un-

ion. JVE is a disguised continuation of VE which was left to dwindle under the indifferent stewardship of A. J. as he advanced into retirement. The viable business continued as it always had under Jimmy's direction, ownership, and control. The General Counsel seeks a finding that JVE is an alter ego of VE or alternately that VE and JVE are a single employer and that JVE be found subject to all of VE's bargaining obligations, past and present and the employees be made whole for losses suffered because of the Respondents' failure to adhere to the collective-bargaining agreements.

The Respondent JVE contends in its brief as follows:

JVE is not the alter ego of VE and the Respondents are not a single employer, citing *Johnstown Corp.*, 322 NLRB 818 (1997). JVE notes that alter ego and single employer are related but separate concepts. In considering whether an employer is a "single employer," the Board utilizes the following criteria:

1. Interrelation of operations
2. Common management
3. Centralized control of labor relations, and
4. Common ownership or financial control.

JVE cites *Gartner-Harf Co.*, 308 NLRB 531 (1992); and *V & S Progalv*, 323 NLRB 801 (1997), in support thereof. He notes that these criteria have been approved by the Supreme Court citing *Broadcast Technicians Local 1264 v. Broadcast Service of Mobile*, 380 U.S. 255 (1965).

Respondent JVE notes that although the common ownership factor may be met where both companies are owned by members of the same family, family ownership is insufficient to establish single employee status or even the common ownership factor as common ownership is the least important factor in the single employer analysis. The Board focuses on whether the owners of one company retain financial control over the operations of the other, citing *Vector Valley Heating & Air Conditioning*, 267 NLRB 1292 (1983). In this case, A. J. and his wife, Virginia Vallery have never had any financial control over JVE. After his resignation as president of VE neither Jimmy, nor his wife Bobbi, have had any financial control over VE.

The proper focus in this case is on the time period after Jimmy resigned from and left VE and JVE then commenced doing business. There was only a very short time (March 21 to May 9, 1997) between the formation of JVE and Jimmy leaving VE and commencing business as JVE. Further VE continued to exist and do business after the formation of JVE.

There is no centralized control of labor relations as there are two different people in charge of labor relations at two different companies located at two different and separate facilities. A. J. is responsible for labor relations at VE and hires employees through the union hall, schedules and supervises their work and determines the terms and conditions of their employment which are primarily established by the Commercial Market Recovery Agreement CMRA. Conversely, Jimmy is responsible for labor relations at JVE and hires and fires and disciplines employees and schedules and supervises their work and sets their pay. There is no common management. A. J. manages VE with assistance from his wife Virginia. Jimmy manages JVE with assistance from his wife Bobbie.

There is no interrelation of operations. Both Companies have separate offices and warehouses, separate equipment. Their customer basis is different as VE does commercial work, primarily on a bid basis whereas JVE does residential work primarily negotiated directly with a customer. They do not provide services for or make sales to each other.

Respondent JVE contends that the factors in determining alter ego status are:

1. Unlawful motive, and
2. Substantially identical
   - A. Management
   - B. Business purpose
   - C. Operation
   - D. Equipment
   - E. Customers
   - F. Supervision
   - G. Ownership

Citing *C.E.K. Industrial Mechanical Contractors v. NLRB*, 921 F.2d 350 (1st Cir. 1990); and *Advance Electric*, 268 NLRB 1001 (1984). Since in this case VE continues to exist, alter ego status can only be found when there is a finding of an illegal motive, citing *Precision Builders*, 296 NLRB 105 (1989). As Chairman Stephens stated in that case:

> Without the motive finding, the alter ego test is indistinguishable from the single employer test. The alter ego cases in which a finding of unlawful motive may be dispensed with are the disguised continuance cases, i.e., those in which one entity has disappeared and has been succeeded by another that is indistinguishable from it in certain specific respects. See, e.g., *Advance Electric*, 268 NLRB 1001, 1004 (1984).

Unlawful motive exists where there is an attempt to avoid the obligations of a collective-bargaining agreement through a sham transaction or a technical change in operations, citing *Carpenters Local 1478 v. Stevens*, 743 F.2d 1271 (9th Cir. 1984).

As Jimmy and A. J. testified, JVE was established to become a force in the residential and service industry in the Monroe and West Monroe, Louisiana areas and to alleviate any future family, or legal problems between Jimmy and his sisters over the ownership of VE if their father, A. J., died. VE's residential work had always been nonunion as it had to be to compete with other nonunion shops doing residential work. These are not unlawful motives. The alter ego doctrine was developed to prevent employers from evading obligations under the Act merely by changing or altering their corporate form, citing *NLRB v. Fullerton Transfer & Storage,* 910 F.2d 331, 337 (6th Cir. 1990). Since VE had no obligations under the Act concerning its residential work, there were no obligations to avoid. JVE was not created to avoid VE's obligations under the CMRA for commercial work. The overwhelming majority (55 of 68 jobs) have been residential. JVE does not actively bid on commercial work but will perform commercial work offered to it by its residential customers. See *Kenton Transfer Co.,* 298 NLRB 487 (1990); criteria *Victor Vallery Heating & Air Con-*

*ditioning*, 267 NLRB 1292 (1983); *First Class Maintenance Service,* supra; *Friederich Truck Service,* 259 NLRB 1294 (1982); and *Elec-Comm, Inc.*, 298 NLRB 705 (1990), for analogous cases wherein single-employer and alter ego status were rejected.

Analysis

I find that Respondents are properly subject to the Board's jurisdiction as members of the multiemployer bargaining group as contended by the General Counsel in her brief.

I find that Respondent JVE is an alter ego of VE, and alternately that Respondents are a single employer. The evidence overwhelmingly demonstrates that JVE is no more than a disguised continuation of VE and that JVE was formed to evade VE's obligations under the recognition agreement and the letter of assent signed by Jimmy binding VE to recognize the Union as the exclusive collective-bargaining representative of the unit employees performing electrical work, both commercial and residential as plainly stated in the labor agreement. Assuming arguendo there had been a tacit agreement between Jimmy on behalf of VE and former business manager, Lonnie Shows, to ignore the agreement with respect to the electricians performing residential work, this was of no consequence in this case. Jimmy as VE's president was clearly put on notice by new Business Manager John Hopkins that he intended to enforce the recognition of the Union as the exclusive collective-bargaining representative of the unit employees performing all types of electrical work and not merely those employees performing commercial work. When Jimmy Vallery signed the recognition agreement on June 18, 1996, he was clearly on notice of Hopkins' position that the Union represented all unit employees performing electrical work. Thus the clear and unmistakable language of these agreements cannot be ignored. It is clear that JVE is a continuation of VE operating as it had in the past performing both residential and commercial work while as contended by the General Counsel, VE has been left to dwindle as A. J. advances into retirement in order to shield JVE from the obligations undertaken by VE. This is the sole reason for the segregation and continued existence of VE, which is now a mere shell as its operations have been transferred to JVE. I find the cases cited by the General Counsel fully support her position in this case. Compare *Gary's Electrical Service Co.*, 326 NLRB 1136 (1998).

The 10(b) Issue

In its posthearing brief Respondent asserts for the first time in this proceeding that the charges underlying the complaint are untimely as they were not filed within the 6-month limitation for the filing of unfair labor practice charges contained in Section 10(b) of the Act. I reject this late asserted affirmative defense as itself untimely, *Prestige Ford*, 320 NLRB 1172 (1996), and as without merit. Respondent relies on testimony of Business Manager John Hopkins that he initially saw a JVE sign on a truck in March or April 1997. Initially there is a conflict here as JVE did not commence operations until May 1997. This supports an inference that Hopkins was mistaken about the date. Moreover the appearance of a JVE sign on one of Respondent's trucks is scant evidence of a violation of the Act. The Charging Party must have "unequivocal notice of a violation of the Act." *Leach Corp.*, 312 NLRB 990 (1993). It was not until January 1998 (well within the 10(b) period) that employees Watson and Bryan were informed that VE had no work for them and they reported to the Union hall for referral to employment. It was not until this time that the Union was on notice that an unfair labor practice was committed.

I find that Respondent J. Vallery Electric, Inc. is an alter ego of Vallery Electric, Inc. In the event that the Board disagrees with this finding, I also find in the alternative that Respondents are a single employer under the Act. I thus find that by failing to apply the terms of the labor agreements with respect to its employees performing electrical work, and by its withdrawal of recognition from the Union the Respondents violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent J. Vallery Electric, Inc., is an alter ego of Respondent Vallery Electric, Inc., and an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Alternatively Respondents J. Vallery Electric Inc. and Vallery Electric, Inc. are single employers within the meaning of Section 2(2), (6), and (7) of the Act.

3. The appropriate unit as described in paragraph 8 of the collective-bargaining agreement for the period from September 1, 1997, to August 31, 1999, as set out in article II, section 3 is as follows: "All employees performing electrical work."

4. Respondents violated Section 8(a)(1) and (5) of the Act by since about March 21, 1997, failing to continue in full force and effect the terms and conditions of the Agreement by failing to apply them to the unit employees.

5. Respondents violated Section 8(a)(1) and (5) of the Act by on or about April 9, 1999, withdrawing recognition from the Union as the exclusive collective-bargaining representative of the unit employees.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that the Respondents violated the Act, they shall be ordered to cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes and policies of the Act and post the appropriate notice.

It is recommended that Respondents rescind the withdrawal of recognition of the Union and continue in full force and effect the terms and conditions of the 1997 to 1999 labor agreement and apply them to the unit employees. The Board does not require that employees suffer the loss of increases in wages or improvements in benefits or the addition of new benefits under circumstances such as these and I accordingly do not recommend that any increases in wages and improvements in benefits be rescinded. It is further recommended that Respondents make the employees whole for any loss of wages and benefits suffered because of the unfair labor practices, with interest.

Backpay and benefits shall be computed in accordance with *Ogle Protection Services*, 183 NLRB 682 (1970), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Interest shall be computed at the "short term

Federal Rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

I further recommend that Respondent restore the status quo ante prior to the date of its withdrawal of recognition until the Respondent has on request bargained with the Union for a reasonable period of time. *V & S Progalv*, supra; *Caterair International*, 323 NLRB 64 (1996).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondents, Vallery Electric, Inc., and J. Vallery Electric, Inc., as a single employer/alter ego, Monroe and West Monore, Louisiana, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to apply the terms and conditions of the 1997 to 1999 labor agreement between Quachita Valley Chapter, National Electrical Contractors Association and Local Union 446.

(b) Withdrawing its recognition of the Union as the exclusive collective-bargaining representative of the employees in the aforesaid appropriate unit.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Respondents shall take the following affirmative actions necessary to effectuate the purposes of the Act.

(a) Immediately recognize the Union as the exclusive collective-bargaining representative of the employees in the aforesaid appropriate unit.

(b) On request, bargain with the Union as the exclusive representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(c) Make the unit employees whole for any loss of earnings and other benefits suffered as a result of the unfair labor practices in the manner set forth in the remedy section of the decision.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix.[3]" Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since March 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail to apply the terms and conditions of the 1997–1999 labor agreement to our bargaining unit employees.

WE WILL NOT unlawfully withdraw recognition from Local 446 of the International Brotherhood of Electrical Workers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL immediately recognize the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All employees performing electrical work

WE WILL make the unit employees whole for any loss of earnings and other benefits suffered as a result of the unfair labor practices, with interest.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

VALLERY ELECTRIC, INC., AND J. VALLERY ELECTRIC, AS A SINGLE EMPLOYER/ALTER EGO

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."